A

SABAH BANK BHD

v.

LIEW FUI EN & ANOR

B HIGH COURT SABAH & SARAWAK, KOTA KINABALU
ABDUL RAHMAN SEBLI JC
[CIVIL APPEAL NO: K12-04-2008]
10 MARCH 2009

C ***CONTRACT:*** *Guarantee - Guarantor - Liability of - Notice of demand - Whether valid - Whether demand letter a copy and not the actual notice - Whether defective - Whether notice of demand properly sent to respondents*

D ***CONTRACT:*** *Guarantee - Guarantor - Liability of - Satisfaction of charge - Whether contained qualification or reservation - Whether expressed to be for 'full and complete satisfaction of the charge on the land' - Whether there was an outstanding amount due after issuance of satisfaction of charge*

E This was an appeal against the decision of the Sessions Court dismissing the appellant's claim against the respondents who stood as guarantors to Sabah Décor Sdn Bhd ('Sabah Décor'). Briefly, the facts were that by a letter of offer, the appellant granted to Sabah Décor an overdraft facility in the sum of RM200,000 F repayable on demand at the agreed interest rate of 9% per annum. The respondents, together with another person ('the third guarantor') stood guarantee for the said facility. Sabah Décor went into debt and the appellant took the present action to recover the amount owing. The respondents did not dispute that G Sabah Décor was indebted to the appellant but denied that they were liable under the said guarantee. The issues that arose were (i) whether the appellant did not make any demand on the respondents in accordance with the letter of guarantee and (ii) whether the appellant's execution of the Satisfaction of Charge in H respect of NTO23908198 for a lesser sum was in full and final settlement of the total outstanding due to the appellant under the facility agreement.

Held (dismissing the appeal):

I

(1) There was no dispute that the guarantee was an on demand guarantee. The operative words in cl. 13 of the said guarantee was 'if sent.' For the provision to apply it must first be

established by the appellant that the demand had been sent to the respondents. However, the demand letter was only a copy, not the actual letter. Thus, even if the letter of demand had been sent to the correct address of the respondents, it was only a copy and not the actual notice. The demand was therefore defective and not a valid demand. Failure to prove that the notice of demand had been sent to the respondents meant that the plaintiff had failed to discharge its burden of proving that a demand was made. The Sessions Judge was not wrong in finding that the notice of demand had not been sent to the respondents. (paras 5, 8 & 11)

(2) The charge was for a sum of RM200,000 in relation to a piece of land in Papar. This amount corresponded with the amount of overdraft facility granted to Sabah Décor. With the consent of the appellant, the charged land was sold by way of private treaty for a lesser sum of RM40,000. This sum was remitted to the appellant and it was in respect of this payment that the satisfaction of charge was issued by the appellant. However, the said satisfaction of charge did not contain any qualification or reservation. Specifically it did not say that the appellant reserved the right to claim the balance of the respondents' account. Since the satisfaction of charge in the present case was expressed to be for 'full and complete satisfaction of the charge on the land' the appellant could not now be heard to say that as long as Sabah Décor still owed money to the appellant the respondents were still liable to the appellant under the joint and several guarantee. (paras 17, 18 & 19)

(3) The other factor to take note of was that the satisfaction of the charge was a document issued pursuant to s. 109 of the Land Ordinance. Therefore, it was a matter that was required by law to be reduced into writing within the meaning of s. 91 of the Evidence Act 1950 ('the Act'). The Sessions Judge was therefore right in disregarding PW1's evidence that there was still an outstanding amount due after the issuance of the satisfaction of the charge. (para 21)

(4) It was contended by the appellant that the satisfaction of charge only applied to the Paper land not to the Semporna land which was the other land charged as security for overdraft facility. It was pointed out that the appellant never

executed any satisfaction of charge in respect of the Semporna land and that therefore there was still an outstanding amount due to the appellant. However, there was no merit in this contention. Even though the overdraft facility required two pieces of land as security the amount guaranteed was the same as the amount secured by the charge involving the Papar land, which was the sum of RM200,000. Clearly, the satisfaction of charge was related to the only overdraft facility account granted to Sabah Décor. There was no evidence of the existence of any other account for the same facility. It was therefore untenable for the appellant to argue that the satisfaction of charge must take into account the other charged land. (para 22)

Case(s) referred to:

Amanah Merchant Bank Bhd v. Lim Tow Choon (Through Official Assignee) [1994] 2 CLJ 1 SC ***(dist)***

Inspector General of Police & Anor v. Alan Noor Kamat [1987] 1 LNS 101 SC ***(refd)***

Juahir Sadikan v. Perbadanan Kemajuan Negeri Johor [1996] 4 CLJ 1 CA ***(refd)***

Mok Hin Wah & Ors v. United Malayan Banking Corp Bhd [1987] 2 CLJ 197; [1987] CLJ (Rep) 219 ***(foll)***

Standard Chartered Bank v. Mukah Singh [1996] 1 LNS 559 HC ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 91, 92

Land Ordinance, s. 109

For the appellant - Chin Yuen Fong; M/s Chin Lau Wong & Foo
For the respondents - Victor Chong; M/s Poh & Victor Chong

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Rahman Sebli JC:

[1] This is an appeal against the decision of the Sessions Court dismissing the appellant's claim against the respondents who stood as guarantors to Sabah Décor Sdn Bhd. ("Sabah Décor"). Briefly the facts are as follows. By a letter of offer dated 30 August 1984, the appellant granted to Sabah Décor an overdraft facility in the sum of RM200,000 repayable on demand at the agreed interest rate of 9% per annum. The respondents together with

another person ("the third guarantor") stood guarantee for the said facility. Sabah Décor went into a debt and the appellant took out the present action to recover the amount owing. The respondents do not dispute that Sabah Décor was indebted to the appellant but deny that they are liable under the said guarantee. At the trial only the 2nd respondent gave evidence for the defence.

[2] The appellant's appeal is against the following parts of the Sessions Court's decision:

(1) that part as decides that the appellant did not make any demand on the respondents in accordance with the letter of guarantee dated 31 October 1984.

(2) that part as decides that the appellant's execution of the satisfaction of charge in respect of NT023908198 for a lesser sum was in full and final settlement of the total outstanding due to the appellant under the facility agreement.

Whether There Was A Demand

[3] There is no dispute that the guarantee is an on demand guarantee. Clause 1 of the guarantee is couched in the following terms:

> In consideration of your making or continuing advances or otherwise giving credit or affording banking facilities (including *inter alia* the issue of guarantees by you and your acceptance of guarantees by the Principal as hereafter defined in favour of third parties) for as long as you shall think fit to Sabah Décor Sdn Bhd (hereinafter called "the Principal") we, the undersigned, hereby agree to pay you on demand all sums of money which are now or shall at any time be owing to you anywhere on any account whatsoever whether on the Principal solely or from the Principal jointly with any other person or persons or from any firm in which the Principal may be a partner including the amount of notes or bills discounted or paid or other loans, credits or advances made to or for the accommodation or at the request either of the Principal solely or jointly or of any such firm as aforesaid or for any money for which the Principal may be liable as surety or in any other way whatsoever together with in all the cases aforesaid all interest, discount and other banker's charges including legal charges occasioned by or incident to this or any other security held by or offered to you for the same indebtedness or by or to the enforcement of any such security.

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> Provided always that the joint and several liability ultimately enforceable against us under this guarantee shall not exceed in aggregate the sum of $200,000 together with interest thereon at the rate of 9% per cent per annum subject to fluctuations at your discretion, from the date of demand by you on us for payment.

B

[4] The mode of making the demand is stipulated in cl. 13 of the guarantee as follows:

> Any notice of demand hereunder shall be deemed to have been sufficiently given if sent by prepaid letter post to the address in
C Malaysia last known to you or stated hereon of the one of us to whom or to whose personal representatives such notice is given and shall be assumed to have reached the addressee in the course of post. In case of the death of any of us and until you receive notice in writing of the grant of probate of his will or of administration of his estate any notice or demand by you sent by
D post as aforesaid addressed to such one of us or his personal representatives at his address last known to you or stated hereon shall for all purposes of this guarantee be deemed a sufficient notice or demand by you to such one of us and his personal representatives and shall be as effectual as if he were still living.

E

[5] In my view the operative words in the above deeming clause is "if sent". Thus for the provision to apply it must first be established by the appellant that the demand had been sent to the respondents. In the present case the demand was purportedly made through a copy of a letter sent by Messrs Chin Lau Wong
F & Foo dated 24 July 1987 to the respondents and the third guarantor. It was sent to P.O. Box No. 11370, 88815 Kota Kinabalu. According to the appellant this was the address used by the respondents in their letter to the appellant dated 21 August 1987 (P5) in response to their letter of demand dated 24 July
G 1987 (P3). This according to the appellant is proof that the demand had been sent to the respondents' last known address.

[6] The respondents denied that the demand letters were ever sent to them. In para 23 of his witness statement this is what the
H 2nd respondent said:

> Refer Disputed Bundle, page 12 which is a letter of demand dated 24th July 1987 issued by the Plaintiff's Solicitors, Messrs Chin Lau Wong & Foo to 2nd, 3rd and 4th Defendants. I have not seen this letter before and I have never received this letter either
I by A.R. Registered Post or ordinary post. As for the A.R.

Registered Card (Refer Disputed Bundle, page 13), I did not sign the card. The card was also not signed by the 2nd Defendant. The 2nd Defendant's signature should look like the one appears in Agreed Bundle, pages 52 and 57.

[7] Whether or not a demand was made is primarily a question of fact. In this regard it was the finding of the learned Sessions Judge that the appellant had failed to do so. He was satisfied that the demand letter (P3) was meant for and only sent to the third guarantor and not the respondents. The basis for his conclusion is that of the three names appearing in the demand letter only the name of the third guarantor had a tick next to it.

[8] The demand letter it will be noted is only a copy, not the actual letter. In this connection the decision of the Supreme Court in *Mok Hin Wah & Ors v. United Malayan Banking Corp. Bhd* [1987] 2 CLJ 197; [1987] CLJ (Rep) 219 is relevant. In that case it was held, *inter alia* that the creditor must prove a real demand by sending the actual notice of demand to the respective guarantors and not merely a carbon copy of the notice.

[9] Thus even if the letter of demand had been sent to the correct address of the respondents it was only a copy and not the actual notice. The demand is therefore defective and not a valid demand.

[10] There is another reason which I think supports the learned Sessions Judge's finding that the demand letter had not been proven to have been sent to the respondents. The only witness called by the appellant to prove its case was Paul Leong (PW1), its Damai Branch manager. In his witness statement PW1 did not say a word about any notice of demand and in his oral testimony in court he merely confirmed that P3 is the letter of demand issued by Chin Lau Wong & Foo to the guarantors without saying whether the letter had in fact been sent to the respondents. Clearly this is not evidence of service of the letter of demand. P3 is only evidence that Messrs Chin Lau Wong & Foo prepared a notice of demand on behalf of the appellant and nothing more.

[11] Failure to prove that the notice of demand had been sent to the respondents means that the plaintiff has failed to discharge its burden of proving that a demand was made. The Supreme Court case of *Amanah Merchant Bank Bhd v. Lim Tow Choon (Through Official Assignee)* [1994] 2 CLJ 1 was cited by the appellant

to support its contention that it is sufficient for the appellant to show that the notice was correctly addressed, prepaid and delivered to the post office and acknowledged for service by the postal authority. With due respect counsel's reliance on this authority is misplaced for the simple reason that the facts in that case are poles apart from the facts in the present case. In that case, unlike the present case there was proof that the notice of demand was delivered to the post office and acknowledged for service by the postal authority. The judgment in that case is therefore irrelevant.

[12] With regard to the appellant's contention that the respondents' response (P5) to its letter of demand (P3) is proof that the respondents had received the letter of demand the learned Sessions Judge accepted the respondents' explanation that the response letter was prepared by the third guarantor and that they were merely asked to sign it as the third guarantor needed the letter to inform the appellant's solicitors that he had approached the appellant to settle the outstanding debt. This part of the respondents' evidence was not challenged at all in cross examination. The learned Sessions Judge cannot therefore be faulted for accepting it.

[13] It was then argued by the appellant that this part of the 2nd respondent's evidence should have been disregarded by the learned Sessions Judge as it was not pleaded in the defence. It was further submitted that the burden was on the 2nd respondent to call the 1st respondent as a witness to corroborate this allegation. For this proposition the appellant relied on the following observation of the Court of Appeal in *Juahir bin Sadikan v. Perbadanan Kemajuan Negeri Johor* [1996] 4 CLJ 1:

> According to s. 103 of the Evidence Act, a person who alleges must prove such allegation. Thus, it was incumbent on the appellant to produce Tan Sri Basir as his witness to prove the allegation. The fact that the appellant was unable to secure the attendance of Tan Sri Basir as a witness did not shift the burden to the respondent to produce the witness and testify to what he had uttered because: (i) the respondent never raised such an allegation; and (ii) the respondent denied even making one.
>
> There was no obligation in law for the respondent to produce the witness as that allegation rested with the appellant, the party who made the allegation, and the fact that the appellant was unable to do so was fatal to his case.

[14] I fail to see how the above passage supports the appellant's contention. In the first place the 2nd respondent did not say that P5 was prepared by the 1st respondent. In his witness statement the 2nd respondent clearly said that P5 was prepared by the third guarantor who is not a party to this appeal. Therefore the question of calling the 1st respondent to corroborate his evidence on this point does not arise. In any event if the appellant was referring to the third guarantor and not the 1st respondent as the person who prepared P5 I am of the view that the points raised are of no consequence as the appellant failed to discharge its burden of proving service of the letter of demand which is a prerequisite for determining liability under the guarantee. Without proof of demand there can be no liability. The appellant cannot rely on any defect in the respondents' case to patch up a defect in its own case if otherwise it has failed to discharge its burden of proof.

[15] On the evidence before him I am not prepared to say that the learned Sessions Judge was wrong in finding that the notice of demand had not been sent to the respondents. Clearly this is not a case where the finding is unsupported by evidence, and the question no doubt involves the question of the credibility of the witnesses. I am not convinced that there is sufficient basis for me to displace such finding of fact.

Whether The Satisfaction of Charge In Respect Of NT23908198 For A Lesser Sum Was In Full And Final Settlement Of The Debt

[16] In the satisfaction of charge the appellant declared as follows:

> We Sabah Bank Bhd of WDT132, 88999 Kota Kinabalu do hereby declare that we have received full and complete satisfaction of the charge on the land described in Title No.023908198 which charge was registered as Memorial No. 00036833 Memo Seq. No 7 in title in the District Land Office of Papar ...

[17] The charge was for a sum of RM200,000 and relates to a piece of land in papar. This amount corresponds with the amount of overdraft facility granted to Sabah Décor. With the consent of the appellant the charged land was sold by way of private treaty for a lesser sum of RM40,000. This sum was remitted to the appellant on 20 July 1989. It was in respect of this payment that

A the satisfaction of charge was issued by the appellant. The question is whether the satisfaction of charge discharged the whole debt as contended by the respondents or whether it was part settlement only of the outstanding sum as contended by the appellant.

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[18] The satisfaction of charge it will be noted does not contain any qualification or reservation. Specifically it does not say that the appellant reserved the right to claim the balance of the respondents' account. In this connection the decision of the High C Court in *Standard Chartered Bank v. Mukah Singh* [1996] 1 LNS 59 is instructive. In that case it was argued by the defendant that the satisfaction of charge issued by the plaintiff after receiving a lower sum from proceeds of a private treaty sale of the charged property discharged the whole debt. This argument did not find D favour with the High Court on the ground that the satisfaction of charge was qualified with the following proviso:

> without prejudice to our rights to claim the balance of the chargor's outstanding account due to us.

E **[19]** The learned judge also referred to the common law position that payment of a smaller sum could discharge a larger debt. In my view since the satisfaction of charge in the present case is expressed to be for "full and complete satisfaction of the charge on the land" the appellant cannot now be heard to say that as F long as Sabah Décor still owed money to the appellant the respondents are still liable to the appellant under the joint and several guarantee.

[20] The appellant contended that the intention of the parties all G along with regard to the private treaty was only to "part settle" the outstanding debt and that in any event cl. 2 of the guarantee stipulates that the guarantee shall remain valid and binding on the guarantors until all outstanding sums owed by Sabah Décor are fully paid up. I find no substance in this argument as it runs H counter to the appellant's own unqualified declaration in the satisfaction of charge itself.

[21] The other factor to take note of is that the satisfaction of charge is a document issued pursuant to s. 109 of the Land Ordinance. It is therefore a matter that is required by law to be I reduced into writing within the meaning of s. 91 of the Evidence Act 1950 ("the Act"). In *Inspector General of Police & Anor v. Alan*

Noor bin Kamat [1987] 1 LNS 101 the Supreme Court held that s. 92 of the Act prohibits the giving of oral evidence to contradict or vary or explain the terms of any matter which is required by law to be reduced in the form of a document. The learned Sessions Judge was therefore right in disregarding PW1's evidence that there is still an outstanding amount due after the issuance of the satisfaction of charge.

[22] It was finally contended by the appellant that the satisfaction of charge only applied to the Papar land and not to the Semporna land which was the other land charged as security for the overdraft facility. It was pointed out that the appellant never executed any satisfaction of charge in respect of the Semporna land and that therefore there is still an outstanding amount due to the appellant. I find no merit in this contention as well. Even though the overdraft facility required two pieces of land as security the amount guaranteed was the same as the amount secured by the charge involving the Papar land, which is the sum of RM200,000. This was confirmed by PW1 himself. Further it is clear that the satisfaction of charge relates to the only overdraft facility account granted to Sabah Décor. There is no evidence of the existence of any other account for the same facility. It is therefore untenable for the appellant to argue that the satisfaction of charge must take into account the other charged land.

[23] For the above reasons the appeal was dismissed with costs.